

## V. Accelerated Approval of Proposed Rule Change, as Modified by Amendment No. 1

The Commission finds good cause to approve the proposed rule change, as modified by Amendment No. 1 prior to the thirtieth day after the date of publication of notice of the filing of Amendment No. 1 in the **Federal Register**. Amendment No. 1 does not modify the substance of the proposal or raise new regulatory issues. As described more fully above, Amendment No. 1 clarifies several aspects of the proposal and provides updated data and additional analysis to support the proposal. Among other things, Amendment No. 1 provides further analysis regarding the potential effect of the proposal on non-auction response message traffic, including customer orders. Amendment No. 1 also states that all market participants are permitted to submit auction responses to any of the Exchange's auction mechanisms and that all auction responses will be processed through the priority queue. Accordingly, the Commission finds good cause, pursuant to Section 19(b)(2) of the Act,<sup>36</sup> to approve the proposed rule change, as modified by Amendment No. 1, on an accelerated basis.

## VI. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,<sup>37</sup> that the proposed rule change (SR-CBOE-2020-072), as modified by Amendment No. 1, is approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>38</sup>

**J. Matthew DeLesDernier,**

*Assistant Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-90185; File No. SR-NYSEAMER-2020-75]

### Self-Regulatory Organizations; NYSE American LLC; Notice of Filing and Immediate Effectiveness of Proposed Change To Modify the NYSE American Options Fee Schedule

October 14, 2020.

Pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 (the

“Act”)<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> notice is hereby given that, on October 8, 2020, NYSE American LLC (“NYSE American” or the “Exchange”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

#### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to modify the NYSE American Options Fee Schedule (“Fee Schedule”) to extend the waiver of certain Floor-based fixed fees. The Exchange proposes to implement the fee change effective October 8, 2020.<sup>4</sup> The proposed change is available on the Exchange's website at [www.nyse.com](http://www.nyse.com), at the principal office of the Exchange, and at the Commission's Public Reference Room.

#### II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

##### A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

###### 1. Purpose

The purpose of this filing is to modify the Fee Schedule to extend the waiver of certain Floor-based fixed fees for market participants that have been unable to resume their Floor operations to a certain capacity level, as discussed below. The Exchange proposes to implement the fee change effective October 8, 2020.

On March 18, 2020, the Exchange announced that it would temporarily

close the Trading Floor, effective Monday, March 23, 2020, as a precautionary measure to prevent the potential spread of COVID-19. Following the temporary closure of the Trading Floor, the Exchange waived certain Floor-based fixed fees for April, May and June 2020.<sup>5</sup> Although the Trading Floor partially reopened on May 26, 2020 and Floor-based open outcry activity is supported, certain participants have been unable to resume pre-Floor closure levels of operations. As a result, the Exchange extended the fee waiver through July, August, and September 2020, but only for Floor Broker firms that were unable to operate at more than 50% of their March 2020 on-Floor staffing levels and for Market Maker firms that have vacant or “unmanned” Podia for the entire month due to COVID-19 related considerations (the “Qualifying Firms”).<sup>6</sup> Because the Trading Floor will continue to operate with reduced capacity, the Exchange proposes to extend the fee waiver for Qualifying Firms through the earlier of the first full month of a full reopening of the Trading Floor facilities to Floor personnel or December 2020.<sup>7</sup> The Exchange also proposes to clarify that Qualifying Firms would include firms that began Floor operations after March 2020 that are unable to operate at more than 50% of their Exchange-approved on-Floor staffing levels.<sup>8</sup>

Specifically, as with the prior fee waivers, the proposed fee waiver covers the following fixed fees for Qualifying

<sup>5</sup> See Securities Exchange Act Release Nos. 88595 (April 8, 2020), 85 FR 20737 (April 14, 2020) (SR-NYSEAMER-2020-25) (waiving Floor-based fixed fees); 88840 (May 8, 2020), 85 FR 28992 (May 14, 2020) (SR-NYSEAMER-2020-37) (extending April 2020 fee changes through May 2020); and 89049 (June 11, 2020), 85 FR 36649 (June 17, 2020) (SR-NYSEAMER-2020-44) (extending April and May fee changes through June 2020). See also Fee Schedule, Section III. Monthly Trading Permit, Rights, Floor Access and Premium Product Fees, and IV. Monthly Floor Communication, Connectivity, Equipment and Booth or Podia Fees.

<sup>6</sup> See Securities Exchange Act Release Nos. 89241 (July 7, 2020), 85 FR 42034 (July 13, 2020) (SR-NYSEAMER-2020-47); 89482 (August 5, 2020), 85 FR 48577 (August 11, 2020) (SR-NYSEAMER-2020-55); 89692 (August 27, 2020), 85 FR 54611 (September 2, 2020) (SR-NYSEAMER-2020-65). See also Fee Schedule, Section III. Monthly Trading Permit, Rights, Floor Access and Premium Product Fees, and IV. Monthly Floor Communication, Connectivity, Equipment and Booth or Podia Fees.

<sup>7</sup> See proposed Fee Schedule, Section III. Monthly Trading Permit, Rights, Floor Access and Premium Product Fees, and IV. Monthly Floor Communication, Connectivity, Equipment and Booth or Podia Fees.

<sup>8</sup> See *id.* The Exchange originally filed in September 2020 (see *supra* note 4) to make explicit the treatment of firms that began Floor operations after March 2020 and this change applies to firms that joined the Exchange on September 1st or thereafter.

<sup>2</sup> 15 U.S.C. 78a.

<sup>3</sup> 17 CFR 240.19b-4.

<sup>4</sup> The Exchange originally filed to amend the Fee Schedule on September 24, 2020. (SR-NYSEAMER-2020-70) and withdrew such filing on October 8, 2020.

<sup>36</sup> 15 U.S.C. 78s(b)(2).

<sup>37</sup> 15 U.S.C. 78s(b)(2).

<sup>38</sup> 17 CFR 200.30-3(a)(12).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

Firms, which relate directly to Floor operations, are charged only to Floor participants and do not apply to participants that conduct business off-Floor:

- Floor Access Fee;
- Floor Broker Handheld;
- Transport Charges;
- Floor Market Maker Podia;
- Booth Premises; and
- Wire Services.<sup>9</sup>

The proposed fee change is designed to reduce monthly costs for all Qualifying Firms whose operations continue to be disrupted even though the Trading Floor has partially reopened. In reducing this monthly financial burden, the proposed change would allow Qualifying Firms that had Floor operations in March 2020 to reallocate funds to assist with the cost of shifting and maintaining their prior fully-staffed on-Floor operations to off-Floor and recoup losses as a result of the partial reopening. Absent this change, all Qualifying Firms may experience an unexpected increase in the cost of doing business on the Exchange.<sup>10</sup> The Exchange believes that all Qualifying Firms would benefit from this proposed fee change.

## 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,<sup>11</sup> in general, and furthers the objectives of Sections 6(b)(4) and (5) of the Act,<sup>12</sup> in particular, because it provides for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers.

The Exchange operates in a highly competitive market. The Commission has repeatedly expressed its preference for competition over regulatory

<sup>9</sup> See *id.* (including the deletion of the now superfluous word “only” regarding the duration of the fee waiver). In addition, consistent with the proposed changes to the preamble of Section IV of the Fee Schedule to update the potential duration of the fee waiver, which includes a delineation of each fee waived, the Exchange proposes to delete (the now repetitive) references that appear (again) next to each fee waived for Qualifying Firms as well as to delete references to prior months (now concluded) during which the fee waivers were in place. See proposed Fee Schedule, IV. Monthly Floor Communication, Connectivity, Equipment and Booth or Podia Fees.

<sup>10</sup> The Exchange will refund participants of the Floor Broker Prepayment Program for any prepaid 2020 fees that are waived. See proposed Fee Schedule, Section III.E.1 (providing that “the Exchange will refund certain of the prepaid Eligible Fixed costs that were waived for Qualifying Firms, as defined, and set forth in, Sections III.B and IV”).

<sup>11</sup> 15 U.S.C. 78f(b).

<sup>12</sup> 15 U.S.C. 78f(b)(4) and (5).

intervention in determining prices, products, and services in the securities markets. In Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system “has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.”<sup>13</sup>

There are currently 16 registered options exchanges competing for order flow. Based on publicly-available information, and excluding index-based options, no single exchange has more than 16% of the market share of executed volume of multiply-listed equity and ETF options trades.<sup>14</sup> Therefore, currently no exchange possesses significant pricing power in the execution of multiply-listed equity & ETF options order flow. More specifically, in August 2020, the Exchange had less than 10% market share of executed volume of multiply-listed equity & ETF options trades.<sup>15</sup>

This proposed fee change is reasonable, equitable, and not unfairly discriminatory because it would reduce monthly costs for all Qualifying Firms whose operations have been disrupted despite the fact that the Trading Floor has partially reopened because of the social distancing requirements and/or other health concerns related to resuming operation on the Floor. In reducing this monthly financial burden, the proposed change would allow Qualifying Firms that had Floor operations in March 2020 to reallocate funds to assist with the cost of shifting and maintaining their prior fully-staffed on-Floor operations to off-Floor and recoup losses as a result of the partial reopening of the Floor. Absent this change, all Qualifying Firms may experience an unexpected increase in the cost of doing business on the Exchange. The Exchange believes that all Qualifying Firms would benefit from this proposed fee change.

The Exchange believes the proposed rule change is an equitable allocation of its fees and credits as it merely continues the previous fee waiver for Qualifying Firms, which affects fees charged only to Floor participants and does not apply to participants that

<sup>13</sup> See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (S7-10-04) (“Reg NMS Adopting Release”).

<sup>14</sup> The OCC publishes options and futures volume in a variety of formats, including daily and monthly volume by exchange, available here: <https://www.theocc.com/market-data/volume/default.jsp>.

<sup>15</sup> Based on OCC data, see *id.*, the Exchange’s market share in equity-based options increased slightly from 7.73% for the month of August 2019 to 8.18% for the month of August 2020.

conduct business off-Floor. The Exchange believes it is an equitable allocation of fees and credits to extend the fee waiver for Qualifying Firms because such firms have either no more than half of their Floor staff (as measured by either the March 2020 or Exchange-approved) levels or have vacant podia—and this reduction in staffing levels on the Floor impacts the speed, volume and efficiency with which these firms can operate, which is to their financial detriment.

The Exchange believes that the proposal is not unfairly discriminatory because the proposed continuation of the fee waiver would affect all similarly-situated market participants on an equal and non-discriminatory basis.

The Exchange believes that it is reasonable to clarify that firms that began Floor operations on the Exchange after March 2020 would be included as “Qualifying Firms” if such firms are unable to operate at more than 50% of their Exchange-approved on-Floor staffing levels as such treatment places all firms on a level playing field and avoids placing “newer” Qualifying Firms at a financial disadvantage. The Exchange believes that this proposed change would add clarity and transparency and reduce the potential for confusion in the Fee Schedule as relates to the treatment new Floor participants.

Finally, the Exchange believes that it is subject to significant competitive forces, as described below in the Exchange’s statement regarding the burden on competition.

### B. Self-Regulatory Organization’s Statement on Burden on Competition

In accordance with Section 6(b)(8) of the Act, the Exchange does not believe that the proposed rule change would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange believes that the proposed changes would encourage the continued participation of Qualifying Firms, thereby promoting market depth, price discovery and transparency and would enhance order execution opportunities for all market participants. As a result, the Exchange believes that the proposed change furthers the Commission’s goal in adopting Regulation NMS of fostering integrated competition among orders, which promotes “more efficient pricing of individual stocks for all types of orders, large and small.”<sup>16</sup>

<sup>16</sup> See Reg NMS Adopting Release, *supra* note 13, at 37499.

*Intramarket Competition.* The proposed change, which continues the fee waiver for all Qualifying Firms, is designed to reduce monthly costs for those Floor participants whose operations continue to be impacted, even though the Trading Floor has partially reopened. In reducing this monthly financial burden, the proposed change would allow Qualifying Firms that had Floor operations in March 2020 to reallocate funds to assist with the cost of shifting and maintaining their previously on-Floor operations to off-Floor. Absent this change, all Qualifying Firms may experience an unintended increase in the cost of doing business on the Exchange, given that the Floor has only reopened in a limited capacity. The Exchange believes that the proposed waiver of fees for Qualifying Firms would not impose a disparate burden on competition among market participants on the Exchange because off-Floor market participants are not subject to these Floor-based fixed fees. In addition, Floor-based firms that are not subject to the extent of staffing shortfalls as are Qualifying Firms, *i.e.*, such firms have more than 50% of their March 2020— or Exchange-approved—staffing levels on the Floor and/or have no vacant Podia during the month, do not face the same operational disruption and potential financial impact during the partial reopening of the Floor.

*Intermarket Competition.* The Exchange operates in a highly competitive market in which market participants can readily favor one of the 16 competing option exchanges if they deem fee levels at a venue to be excessive. In such an environment, the Exchange must continually adjust its fees to remain competitive with other exchanges and to attract order flow to the Exchange. Based on publicly-available information, and excluding index-based options, no single exchange currently has more than 16% of the market share of executed volume of multiply-listed equity & ETF options trades.<sup>17</sup> Therefore, currently no exchange possesses significant pricing power in the execution of multiply-listed equity & ETF options order flow. More specifically, in August 2020, the Exchange had less than 10% market share of executed volume of multiply-listed equity & ETF options trades.<sup>18</sup>

The Exchange believes that the proposed rule change reflects this competitive environment because it

waives fees for Qualifying Firms and is designed to reduce monthly costs for Floor participants whose operations continue to be disrupted even though the Trading Floor has partially reopened. In reducing this monthly financial burden, the proposed change would allow affected participants to reallocate funds to assist with the cost of shifting and maintaining their prior fully-staffed on-Floor operations to off-Floor. Absent this change, Qualifying Firms may experience an unintended increase in the cost of doing business on the Exchange, which would make the Exchange a less competitive venue on which to trade as compared to other options exchanges.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

No written comments were solicited or received with respect to the proposed rule change.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A)<sup>19</sup> of the Act and subparagraph (f)(2) of Rule 19b-4<sup>20</sup> thereunder, because it establishes a due, fee, or other charge imposed by the Exchange.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)<sup>21</sup> of the Act to determine whether the proposed rule change should be approved or disapproved.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NYSEAMER-2020-75 on the subject line.

*Paper Comments*

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NYSEAMER-2020-75. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NYSEAMER-2020-75, and should be submitted on or before November 10, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>22</sup>

**J. Matthew DeLesDernier,**

*Assistant Secretary.*

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<sup>22</sup> 17 CFR 200.30-3(a)(12).

<sup>17</sup> See *supra* note 14.

<sup>18</sup> Based on OCC data, *supra* note 15, the Exchange's market share in equity-based options was 7.73% for the month of August 2019 and 8.18% for the month of August 2020.

<sup>19</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>20</sup> 17 CFR 240.19b-4(f)(2).

<sup>21</sup> 15 U.S.C. 78s(b)(2)(B).